Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

WT Docket No. 03-187

In the Matter of

EFFECTS OF COMMUNICATIONS TOWERS ON MIGRATORY BIRDS

Reply Comments of Cingular Wireless LLC and SBC Communications, Inc.

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SUMMARY

The Notice sought comment on whether there are specific factors associated with communications towers that make migratory bird collisions more or less likely. The Comments filed in this proceeding make it clear that there is insufficient science to identify specific factors involved in avian mortality at communications towers. Ongoing research identified in the Comments may (or may not) identify specific factors that increase the risk of avian mortality at communications towers and cost effective means to address those factors. Until that research is complete, the Commission should not modify its existing environmental rules. In its Comments, the Fish and Wildlife Service ("FWS") candidly admits that the existing science is insufficient to warrant rule changes at this time.

Those parties calling for the Commission to adopt the FWS Interim Guidelines as rules cite no evidence of scientific studies that pinpoint specific factors that contribute to bird deaths at communications towers. Furthermore, the Interim Guidelines contain internal inconsistencies that preclude their adoption as rules. Advocates of immediate rule change rely on faulty legal analysis. In their zeal to protect migratory birds, they would jeopardize the health, safety and economic well-being of the American people.

The best science available supports the conclusion that typical CMRS towers pose little, if any, risk to migratory birds. The Commission cannot remove these towers from categorical exclusion and still fulfill its primary statutory obligation to promote the expansion of modern wireless communications to the American public.

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REPLY COMMENTS OF CINGULAR WIRELESS LLC
and
SBC COMMUNICATIONS, INC.

Cingular Wireless LLC ("Cingular") and SBC Communications, Inc. ("SBC"), by their attorneys, hereby respond to Comments on the Commission's *Notice of Inquiry* ("Notice") into the Effects of Communications Towers on Migratory Birds, FCC 03-205, released August 20, 2003 ("NOI"). The record is clear that there is insufficient scientific evidence to support amending the Commission's environmental rules to afford greater protection to migratory birds at this time.

I. The Record Is Clear That There Is Not A Sufficient Scientific Basis to Initiate a Rulemaking at This Time.

The Notice sought comment on whether there are specific factors associated with communications towers that make migratory bird collisions more or less likely. It sought comment on whether certain measures might minimize bird collisions with towers. It emphasized that before any such measures are adopted, they must be "supported by adequate and reliable empirical and/or scientific evidence."[1] The Notice sought comment on four factors: tower lighting, tower height, type of antenna structure and location of antenna structure.

[1] Notice at 1.

CTIA[2], PCIA[3] and NAB[4] jointly retained Woodlot Alternatives, Inc. to review and evaluate the existing scientific literature and incidental observations to determine what is, and is not, known about the effects of communications towers on avian mortality. Woodlot's professional staff consists of some of the leading wildlife biologists in the Northeast.[5] They conducted an exhaustive literature review and evaluated the resulting papers based on the scientific strength of the presented data or observations. Woodlot concluded:

> Very few in depth studies on avian mortality at communications towers have been conducted. The majority of studies have examined only single towers and made no comparisons between different towers in different sites. These studies primarily focus on mortality trends and species composition at towers. No published research has systematically examined the host of specific factors that may contribute to mortality at tower sites.[6]

Because of the absence of rigorous, peer reviewed studies of the specific factors involved in avian mortality at communications towers, the Commission announced on September 17, 2003 that it has reached a Memorandum of Agreement with the State of Michigan and the U.S. Fish and Wildlife Service ("FWS") to conduct an Avian Study over the next two and one-half years in connection with the construction of the statewide Michigan Public Safety Communications System.[7] The Avian Study was developed and designed collaboratively by ornithologist Paul Kerlinger of Curry and Kerlinger and

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[2] Cellular Telecommunications & Internet Association ("CTIA").
[3] PCIA: The Wireless Infrastructure Association ("PCIA").
[4] The National Association of Broadcasters ("NAB")
[5] CTIA/NAB Joint Comments at 8.
[6] Woodlot Report, attached as Exhibit A to the CTIA/NAB Joint Comments at ii.
[7] The National Wildlife Federation ("NWF") criticizes the FCC for permitting the 180 tower system for the Michigan State Police. NWF at 2-3. The Michigan system represents a critical technology upgrade to protect the lives and safety of the people of Michigan and the homeland security of all Americans. The Michigan system will also provide a laboratory to study tower characteristics to see if there are reasonable mitigation options available. Attempts by the NWF to delay the deployment of the Michigan public safety initiative are misguided.

wildlife biologist Al Manville of the FWS. The study is intended to research systematically the effects of lighting, height, and guy wires on avian collisions at selected towers in the 350 to 500 foot height range. The study is designed to help identify reasonable and cost-effective measures that might be available to minimize any impacts of the studied tower on migratory birds.[8] Woodlot evaluated the study protocol and concluded:

> A study of this nature, if successful in segregating out the effect of each of these factors, would add greatly to the understanding of avian collisions. Regardless, the regional limitations of the study, the regulated two-year time period, and overall limited number of tower types will likely continue to constrict researchers in developing a full and comprehensive understanding of the potential effects communications towers may have on avian mortality.[9]

One factor suspected of contributing to avian mortality at communications towers is tower lighting. The Federal Aviation Administration ("FAA") regulates the painting and obstruction lighting requirements of communications towers 200 feet and taller and towers near airports.[10] Several different types of obstruction lighting are used on towers. Dr. William Evans currently is studying the impact of different lighting schemes on migratory birds. He does not expect to have statistically solid results until after the fall, 2005 migration season. When his study is complete, Dr. Evans plans to submit the results to the FWS Communications Tower Working Group ("CTWG").[11]

The FWS acknowledges that there is not sufficient scientific information about the specific causes of avian mortality at communications towers to warrant changes in the

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[8] FCC News Release, "Wireless Bureau Announces the State of Michigan to Initiate A Study Assessing the Impact of Communications Towers on Migratory Birds" (Sept. 17, 2003).
[9] Woodlot Report at 36.
[10] 14 C.F.R. § 77.13 (Notice requirement on construction and alteration of communications towers); 47 C.F.R. § 17.7.
[11] Comments of William R. Evans at 3.

FCC's rules at this time.[12] The FWS cites several ongoing research efforts to study the impact of tower lighting on migratory birds, conceding:

> However, until more definitive lighting determinations are reached based on credible, statistically-significant, peer-reviewed science, the Service will not modify its voluntary lighting guidance nor will we make recommendations to the FCC and the Federal Aviation Administration (FAA) to modify their standards until new discoveries are made.[13]

Despite the lack of scientific research into specific factors that may affect avian mortality at communications towers, some commenters assert that there is sufficient scientific information to adopt revised rules now. FOE[14] claims that there has been "overwhelming documentation given to the FCC of significant avian mortality caused by communications towers."[15] ABC[16] states that "The FWS, scientists, and some of the undersigned have provided extensive data to the FCC amply documenting the killing of migratory birds at communications towers."[17]

Generalized research on mortality trends and species composition at communications towers begs the question the Notice asks: what *specific* factors are responsible for avian mortality and what *specific* measures can be taken to mitigate that impact? None of the studies cited by FOE and others address these questions.[18] Until there is a rigorous scientific evidence that, say, tower height or specific lighting schemes are factors that increase the risk to migratory birds, factor specific regulations, like the

[12] FWS Comments at 6.
[13] FWS Comments at 8.
[14] American Bird Conservancy, Forest Conservation Council and Friends of the Earth ("FOE")
[15] FOE Comments at 6.
[16] American Bird Conservancy and 32 other bird organizations ("ABC").
[17] ABC Comments at 1.
[18] *See* FWS Comments at 5-6, acknowledging that the existing scientific studies are inadequate "to tease out issues dealing specifically with lighting, weather, height, topography, location, and other variables."

FWS interim tower siting guidelines, cannot be codified into rules.[19] The work of the CTWG and other research efforts must be completed before any rule modifications should be considered.

II. Commenters Advocating Rule Changes Rely on Faulty Legal Arguments.

Parties advocating rule changes now, most specifically FOE, allege that the Commission's existing rules violate the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA") and the Migratory Bird Treaty Act ("MBTA"). FOE is wrong.

FOE claims that the Commission's rules violate NEPA because the Commission has not undertaken a "programmatic environmental impact statement" and because the rules contain a categorical exclusion for some communications towers.[20] It also claims that the Commission's practice of allowing carriers to perform the initial environmental review violates NEPA.[21] FOE claims that the existing rules violate the MBTA because, under that statute, even unintentional killing is prohibited.[22] FOE also claims that the rules violate the ESA because the Commission has not consulted with the FWS regarding the effect of its tower registration program on endangered species."[23] As shown below, FOE is wrong in every case.

A. The Commission's Rules Do Not Violate NEPA.

The Commission has already considered and rejected arguments advanced by FOE that the existing rules violate NEPA. In *Public Employees For Environmental*

[19] As the FWS candidly admits in its Comments: "What is lacking, however, is the consistent use of a standard research study protocol to conduct these studies, and a more detailed attempt to assess what caused large single-night passerine kills. The etiology of bird-tower mortality is a current major research need." FWS Comments at 3.
[20] FOE Comments at 2.
[21] FOE Comments at 3.
[22] FOE Comments at 4.

Responsibility, 16 FCC Rcd 21439 (2001) ("*PEER*") the Commission held that its existing environmental rules were adopted in consultation with the Council on Environmental Quality ("CEQ") and fulfill its statutory responsibilities under NEPA.

> Perhaps most significantly, Congress empowered the CEQ to review an agency's procedures for identifying classes of activities that can be categorically excluded from EA or EIS requirements. The Commission complied with the CEQ rules by consulting with CEQ during development of categorical exclusions and by obtaining proper CEQ review.[24]

FOE asserts that it is a violation of NEPA to allow carriers to conduct the initial environmental review of a proposed tower and to certify to the Commission that is qualifies for a categorical exclusion.[25] The Commission expressly rejected that claim in *PEER*.

> We also do not agree with PEER's contention that applicant-prepared submissions and certifications regarding the environmental impact of applications or endeavors do not ensure compliance with NEPA and NHPA. CEQ regulations and NHPA rules allow federal agencies to permit applicants to prepare EAs and related documents. The Commission's rules require applicants to indicate whether a proposed facility may have a significant environmental impact, as defined by section 1.1307, and to prepare an EA if such a possibility exists. The Commission independently reviews the EA as well as any additional information it may request from the applicant or other sources, and renders a determination whether to terminate or proceed with further environmental processing.[26]

Baseless legal arguments do not become valid through repetition. The Commission has already considered and rejected FOE's claim that the existing environmental rules violate NEPA.

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[23] FOE Comments at 4.
[24] *PEER*, ¶ 19.
[25] FOE Comments at 6.
[26] *PEER*, ¶ 16.

B. The Commission's Rules Do Not Violate the MBTA.

FOE's assertion that even an unintentional killing of a migratory bird is a federal crime under the MBTA is without merit.[27] As Cingular and SBC demonstrated in their opening comments, courts have repeatedly rejected this contention.[28] The one court that accepted this interpretation declared the statute unconstitutional as applied to unintentional killing of migratory birds, since parties could not conform their conduct to the requirements of the law.[29]

FOE's interpretation of the MBTA would make federal criminals out of millions of automobile drivers, cat owners, and homeowners with picture windows. This is not and cannot be the law.

FOE's claim that the FCC must immediately freeze the construction of new communications towers is as ill-advised as it is irresponsible. FOE puts its zeal to prevent bird deaths ahead of human life and safety. If the standard for siting a tower is that it cannot be responsible for even a single, incidental bird death then no tower could ever be constructed, because no one can assure that a bird will not fly into it. This result directly conflicts with the Commission's express statutory duty "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157. See also 47 U.S.C. § 332(a).

C. The Commission's Rules Do Not Violate the ESA.

FOE contends that the Commission's rules violate the ESA because the Commission does not consult with the FWS pursuant to Section 7 of the ESA prior to the approval of a tower. Again, FOE is wrong. The Commission does not "approve"

[27] FOE Comments at 4. *See also*, FWS Comments at 1, 5.
[28] Cingular/SBC Comments at 4-6.

individual tower siting decisions in the cellular and PCS services. The Commission licenses the use of certain frequencies in a defined geographic area, but it is the carriers who make the tower siting decision. Therefore there is no federal agency action to trigger the application of the ESA.[30]

Assuming, *arguendo*, that the ESA applies, the Commission's rules are in full compliance. The Commission's existing rules require carriers to file an Environmental Assessment ("EA") with the Commission when, among other things, proposed facilities may affect endangered species or designated critical habitat.[31] If an EA is submitted, it must utilize the best scientific and commercial data available.[32] The Commission shall solicit and consider the comments of the FWS.[33] The FCC's Office of General Counsel has issued a letter designating Commission licensees as "non-federal representatives for purposes of consultation" under Section 7 of the ESA. The designation was made pursuant to 50 C.F.R. § 50.402.08.[34] The Commission's website provides guidance to carriers on the consultation that is required.[35] If the Commission concludes that an adverse environmental impact is likely, it shall prepare and process an Environmental Impact Statement "(EIS"). These procedures are compliant with Section 7 of the ESA, FOE's claims to the contrary notwithstanding.

FOE cites *Strahan v. Coxe,* 127 F.3d 155 (1st Cir. 1997), for the proposition that a government agency that issues licenses or permits to a private commercial actor, whose

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[29] *United States v. Rollins*, 706 F.Supp. 742, 744 (D. Idaho 1989)
[30] *See* CTIA/NAB Comments at 4-8 and the cases cited therein.
[31] 47 C.F.R. § 1.1307(a)(3).
[32] 47 C.F.R. § 1.1311(a)(6).
[33] 47 C.F.R. § 1.1308 Note.
[34] *See* Letter from Susan H Steiman, Associate General Counsel, FCC, to Steve Williams, Director, U.S. Fish and Wildlife Service, Department of the Interior dated April 10, 2002. The letter is available on the FCC's website at http://wireless.fcc.gov/siting/Migratorybirdsletter.pdf.
[35] *See* http://wireless.fcc.gov/siting/ea-deficiency-checklist2_1.pdf.

operations in turn injure or kill endangered species is itself liable for a taking.[36] *Strahan* is readily distinguishable from the present case. In *Strahan* the State of Massachusetts issued gillnet and lobster pot fishing permits for coastal waters off Massachusetts listed as critical habitat for the Northern Right whale, the most endangered of the large whales.[37] Entanglement with fishing gear is one of the leading causes of the depletion of Northern Right whales. More than half the Northern Right whale population bear scars indicating entanglement. Strahan, an officer of an environmental protection group called Greenworld, Inc., sought an injunction requiring Massachusetts to revoke licenses it had issued for gillnet and lobster pot fishing and to bar the Commonwealth from issuing such permits in the future. The District Court refused to issue the injunction sought by Strahan, and instead issued an injunction ordering the state to develop a proposal to restrict, modify or eliminate the use of fixed-fishing gear in the restricted area and to convene a Endangered Whale Working Group to discuss with interested parties the modification of fixed-fishing gear and other measures to minimize harm to the Northern Right Whales. Both sides appealed.

The Court of Appeals upheld the injunction. It found that the Endangered Species Act clearly outlawed conduct that would "harm" the Northern Right whale, and that the permits issued by Massachusetts "allow or authorize acts that exact a taking and that, but for the permitting process, could not take place."[38]

> The statute not only prohibits the acts of those parties that directly exact a taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that, contrary to the defendants' argument on appeal, the district court properly found that a governmental third party pursuant to whose authority an actor directly exacts a taking of an

[36] FOE Comments at 4.
[37] The entire population of Northern Right whales is around 300 individuals.
[38] *Strahan*, 125 F.3d at 163.

endangered species may be deemed to have violated the provisions of the ESA.[39]

The state argued that its licensure of gillnetting and lobster pot fishing did not cause the taking of whales any more than their licensure of automobile drivers who commit a federal crime cause the violation. The Court rejected the analogy, noting that the state only licenses automobiles for lawful uses, and when a driver uses her car to commit a federal crime, she goes beyond the licensed purposes of her automobile use. In the case of the licenses for commercial fishing, it is the use of gillnets and lobster pots in the manner specifically contemplated by the license that violates federal law.[40]

In our situation, the FCC licenses spectrum to be used to provide telecommunications services. Unlike *Strahan*, in which it was the conduct licensed (gillnetting and lobster pot fishing) that directly caused a violation of the Endangered Species Act, the provision of telecommunications services does not violate any environmental statutes. Any indirect harm to migratory birds that fly into communications towers is not a direct result of the licensed activity, and hence was not caused by the issuance of the license.

Strahan is interesting in another respect. The injunction only applied to conduct that occurred in a designated critical habitat for the endangered Northern Right whale. As noted above, under the FCC's existing environmental rules, if a tower is proposed to be sited in a designated critical habitat, it is not categorically excluded and an Environmental Assessment must be prepared.[41] If the Commission determines that the tower is likely to have a significant environmental impact, it triggers a public process

[39] *Id.*
[40] *Strahan*, 125 F,3d at 164.
[41] 47 C.F.R. § 1.1307(a)(3).

quite similar to that ordered by the Court in *Strahan.*[42] Thus, under facts similar to those in *Strahan*, the Commission's existing rules provide for the same type of relief that the Court granted in that case. There is no need for additional rules to address FOE's concerns.

III. The FWS Tower Siting Guidelines Cannot Be Imposed on Licensees.

Some commenting parties urge the Commission to adopt the FWS Tower Siting Guidelines as rules. The Commission cannot lawfully promulgate the FWS Guidelines. The FWS itself recognizes that until the CTWG completes its work, there is insufficient scientific evidence to support the adoption of the guidelines as rules.[43] That is why the FWS issued "guidelines" that are "interim" and "voluntary." Calls for the FCC to codify them as "rules" that are "mandatory" and "permanent" are misguided and unsupported.

In addition to lacking sufficient scientific support, the interim guidelines contain internal inconsistencies that would disqualify them as rules. As PCIA notes:

> It is also interesting to note an internal inconsistency in the FWS Guidelines. FWS Guideline 1 calls for collocation of up to ten service providers on one tower; however FWS Guideline 2 calls for tower height to be limited to less than 200 feet. With the vertical separation typically required to prevent interference among service providers, it is difficult—if not impossible—to imagine a 199 foot tower that could accommodate ten wireless service providers. The facilities located on the lowest portions of the tower would likely experience significant blockage and yield minimal coverage.[44]

Another internal inconsistency is between Guideline 2 (keep towers to 199 feet or less) and Guideline 10 (minimize the number of new towers required). Taller towers can

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[42] 47 C.F.R. § 1.1311-1319.

[43] September 14, 2000 Letter from Jamie Rappaport Clark, Director, US Fish and Wildlife Service, Division of Migratory Bird Management to Regional Directors transmitting "Service Interim Guidelines for Recommendations on Communications Tower Siting, Construction, Operation, and Decommissioning." In its Comments, the FWS acknowledges that its guidelines are based on limited science. *See* FWS Comments at 7 (tower lighting), 9 (tower height), 10 antenna structure and tower design), and 10 (antenna and tower location).

provide a wider coverage area. Therefore, if Guideline 2 is followed, more towers will be needed to provide the same level of service, thereby violating Guideline 10.

Guideline 5 is also problematic. It states for lighted towers "the minimum amount of pilot warning and obstruction avoidance lighting required by the FAA should be used." It expresses a preference for white strobe lights and recommends that "these should be the minimum number, minimum intensity, and minimum number of flashes per minute (longest duration between flashes allowable by the FAA)." As PCIA comments:

> The FAA's lighting requirements are designed primarily to address aviation safety concerns, and the FWS Guidelines seem to marginalize these public safety concerns, without an adequate scientific explanation.[45]

The FWS itself recognizes that its guidelines have air safety implications:

> The Service wants to clearly state for the record that we have no intention of requesting modifications to lighting and marking standards that would negatively impact pilot, passenger, and air traffic safety and navigation.[46]

Before any rules are adopted regarding tower lighting, it is incumbent upon the FCC to consult with the FWS and the FAA to evaluate the results of the scientific work in progress in order to strike the optimum balance between aircraft safety and avian mortality.[47] The FWS notes that an Ad Hoc Interagency Lighting Working Group—consisting of the FCC, FAA, FWS and the CEQ—was created in late 2002 to begin informally addressing lighting issues, but that there is much more need for interagency cooperation and coordination before rule changes can be recommended.[48] In any event, the Commission cannot codify the FWS interim guidelines as rules.

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[44] PCIA Comments at 9-10.
[45] PCIA Comments at 8.
[46] FWS Comments at 8.
[47] *See* AT&T Wireless Services, Inc. ("AWS") Comments at 3.
[48] FWS Comments at 9.

IV. The Vast Majority of Cellular and PCS Towers Pose No Danger to Migratory Birds.

The vast majority of cellular and PCS towers pose no danger to migratory birds. The overwhelming majority of cellular and PCS towers are shorter than 200 feet. Sprint reports that over 99 percent of its more than 5600 towers are less than 300 feet and over 85 percent are less than 200 feet. Dr. Paul Kerlinger, a member of the CTWG and Chair of its Research Committee, states that the scientific literature provides little evidence that towers less than 400-500 feet are involved in the death of more than a few birds.[49] Dr. Kerlinger found that the collision risk from CMRS towers under 200 feet "is virtually nonexistent" and that available research "fails to demonstrate significant risk, or even a low risk to birds, at short (<200 feet) unguyed and unlit towers."[50] He estimates that communications towers are responsible for less than one percent of all bird fatalities.[51]

Other commenting parties provide anecdotal support for the proposition that bird kills at towers are rare and few in numbers. NATE,[52] speaking for more than 500 companies involved in tower erection, service and maintenance, reports that "not one member has witnessed more than a few dead birds at one time."[53] The WASB[54] surveyed its members and reported that "virtually all reported that they have never experienced significant number of bird kills at any tower site."[55] Native American tribes report few if any bird deaths at towers on their lands. "Only three recorded collisions have been documented in the Chickasaw Nation in Oklahoma."[56] "The Kenaitze Indian Tribe is

[49] Cingular/SBC Comments at 10.
[50] Sprint Comments at 7.
[51] Sprint Comments at 5.
[52] The National Association of Tower Erectors ("NATE").
[53] NATE at 2.
[54] The Washington State Association of Broadcasters ("WASB").
[55] WASB Comments at 2.
[56] Chickasaw Nation Comments at 2.

not aware of any issues or problems involving migratory birds colliding with communication towers within our jurisdictional area of the Kenai Peninsula."[57] The lack of bird deaths at typical CMRS towers supports the continued application of a categorical exclusion for these towers.

V. The Commission Should Take No Action That Would Impede the Deployment of Modern Communications to the American People.

The Commission has a clear Congressional mandate to foster modern wireless communications networks. Wireless Communications and Public Safety Act of 1999, PL 106-81, 113 Stat. 3 at § 2(a)(6).[58] That is the primary responsibility of the Commission under the Communications Act. The Commission's environmental responsibilities are secondary, and in the event of a conflict must give way.[59] Every hurdle and delay that the Commission imposes impedes the ability of carriers to meet the health, public safety and economic needs of the American people.[60] API[61] urges the Commission "not to lose sight in this proceeding of the need to ensure API and others who rely on communications towers for the provision of vital communications services are not unduly hampered in their ability to continue providing those services."[62] As AWS states:

> The nation's wireless networks are far from completed, however, and much remains to be done to extend current services to all populated areas and travel corridors, and to construct the new facilities needed to support the next generation of advanced broadband mobile services. It is therefore critically important that the additional towers necessary to develop, strengthen and secure our country's wireless network are constructed as

[57] Kenaitze Indian Tribe I.R.A. at 2.
[58] Sprint Comments at 2.
[59] WASB Comments at 4-5 and the cases cited therein.
[60] Sprint Comments at 2.
[61] The American Petroleum Institute ("API").
[62] API Comments at 3.

> rapidly as possible, free from the delay that can be caused by unnecessary or ill-advised regulation.[63]

Those who would cripple the ability of wireless service providers to deploy modern communications networks would impose the most harm on people living in rural America, where the build-out of wireless communications networks is less fully implemented. The Commission must continue to promote, rather than hamper, the continued deployment of wireless communications infrastructure.

A recent example highlights the damage to the deployment of modern communications infrastructure that would result from requiring unnecessary EAs or EISs. From the summer of 2001 through the spring of 2002, VoiceStream participated in a series of public meetings and hearings before the Planning Commission, Zoning Board and Municipal Council of North Ridgefield, Ohio concerning the siting of a proposed 145 foot monopole communications tower. Mr. Larry Kane, on behalf of himself and a number of local residents, raised concerns about the tower before these local authorities. On May 10, 2002, Mr. Kane filed a petition with the FCC asking that an EA or EIS be prepared with regard to the tower. On June 6, 2002, the City of North Ridgefield issued a permit to permit construction of the tower. VoiceStream began work on the foundation for the tower. Mr. Kane then complained to the Commission staff, which instructed VoiceStream to immediately halt construction until the environmental concerns could be investigated and resolved. A pleading cycle on Mr. Kane's petition was concluded on September 1, 2002. When no action was taken by the Commission on Mr. Kane's petition, VoiceStream acquiesced and filed an application and EA with the Commission on May 20, 2003. A pleading cycle on the EA concluded on August 1, 2003. On

[63] AWS Comments at 1.

November 26, 2003 the Wireless Telecommunication Bureau issued a Memorandum Opinion and Order concluding that Mr. Kane's objections to the tower "are wholly without merit", issued a Finding of No Significant Impact to the Environment and granted VoiceStream's application.[64] Thus, a baseless opposition to the tower and the processing of an unnecessary EA delayed the provision of wireless communications services to the people of North Ridgeway for nearly 18 months. The Commission will not fulfill its statutory duty if it eliminates categorical exclusions for most communications towers and requires EAs or EISs that will grind to a halt the expansion of modern wireless communications to the American people.

[64] *In the Matter of T-Mobile and the Pierce Archery Proposed Antenna Tower, 8067 Maddock Road, North Ridgeville, Ohio44039,* **Memorandum Opinion and Roder** DA 03-3826 (rel. November 26, 2003).

VI. Conclusion.

The record in this proceeding shows that there is insufficient scientific information on the impact of communications towers on migratory birds to justify a rulemaking at this time. Communication towers are involved in relatively few migratory bird deaths. The specific factors that may be involved in avian mortality at communications towers have not been identified scientifically. Ongoing research holds promise to identify such factors, if they exist, and may lead to the development of efficient, cost effective means to reduce avian mortality further. However, until the research is concluded and the facts are in, there is no basis for the Commission to modify its existing environmental rules at this time.

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